



FILED
Feb 08 2008, 11:31 am
Kevin L. Smith
CLERK
of the supreme court,
court of appeals and
tax court

FRIEDLANDER, Judge

Jason Eichelberger appeals his conviction for Murder,¹ and presents the following restated issue: Did the trial court properly instruct the jury regarding voluntary intoxication?

We affirm.

The facts, as detailed by our Supreme Court in Eichelberger's direct appeal, are as follows:

[O]n August 17, 1999, James Beasley, Michael Gullett, and the defendant were socializing in the back yard of a residence on East Minnesota Street in Indianapolis. A fight broke out among them, alerting bystanders, who observed Beasley on the ground, and the defendant, holding a knife, standing over him. One bystander called out, "I can't believe you're going to kill him in front of two witnesses," and Beasley escaped. He started running, followed by Gullett and the defendant, who still had the knife in hand. The chase ended two blocks away, when Beasley tripped. Gullett was the first to reach him, and knocked him back down as he attempted to rise. The defendant then caught up, and said, "You made me bleed. [N]ow, [expletive deleted], you're going to bleed." He put his left arm around Beasley's neck and underneath his arm, and stabbed Beasley in the chest with the knife. As Gullett and the defendant ran away, Beasley went to a nearby house for help but died of the stab wound, which had punctured his lung and the left ventricle of his heart.

Eichelberger v. State, 773 N.E.2d 264, 266 (Ind. 2002) (record citations omitted).

The State charged Eichelberger with murder, and his jury trial began in July of 2000. During trial, Eichelberger's counsel tendered an instruction on voluntary manslaughter, which was given by the trial court. The jury ultimately found Eichelberger guilty of murder, and he was sentenced to fifty-five years.

¹ Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).

On direct appeal, Eichelberger challenged the sufficiency of the evidence supporting his conviction. Our Supreme Court affirmed the conviction, concluding that the evidence was sufficient. *Id.* Eichelberger later filed a petition for post-conviction relief arguing that his trial counsel was ineffective because he tendered an incorrect instruction on voluntary manslaughter. The post-conviction court denied Eichelberger's petition, and we reversed concluding that Eichelberger's trial counsel failed to ensure that the jury was properly instructed on the elements of murder. *Eichelberger v. State*, 852 N.E.2d 631 (Ind. Ct. App. 2006), *trans. denied*. On remand, the trial court vacated Eichelberger's conviction and ordered a new trial.

Eichelberger's second jury trial began on May 14, 2007. Eichelberger testified that on the day of Beasley's murder he wanted to get high so he began huffing a substance called toluene.² Eichelberger stated that the toluene affected him "dramatically" and that it caused his mind to feel like it was "all over the place." *Transcript* at 459-60.

At the close of the evidence, the trial court informed the parties that it was including a final jury instruction on voluntary intoxication that read as follows:

Voluntary intoxication is not a defense to a charge of Murder. You may not take voluntary intoxication into consideration in determining whether the defendant acted intentionally, knowingly, recklessly as alleged in the information.

² Toluene is a clear, colorless liquid with a distinctive odor that occurs naturally in crude oil and is also produced in the process of making gasoline. It is commonly used in making paints, paint thinners, fingernail polish, lacquers, and adhesives. Department of Health and Human Services Agency for Toxic Substances & Disease Registry, <http://www.atsdr.cdc.gov/tfacts56.html> (last visited Jan. 22, 2008).

Appellant's Appendix at 222. Eichelberger's counsel did not object to this instruction. The jury found Eichelberger guilty of murder, and the trial court sentenced him to fifty-five years. This appeal ensued.

Eichelberger argues that the trial court abused its discretion by giving the voluntary intoxication jury instruction. Eichelberger's trial counsel did not object to this instruction. The failure of a party to object to a jury instruction given by the trial court results in waiver of that issue on appeal. *Gamble v. State*, 831 N.E.2d 178 (Ind. Ct. App. 2005), *trans. denied*. Eichelberger's appellate counsel does not argue that the giving of the instruction constituted fundamental error. Therefore, this issue is waived.

Waiver notwithstanding, we review a trial court's decision regarding instructing the jury for an abuse of discretion. *Id.* In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction (1) correctly states the law; (2) is supported by evidence in the record; and (3) is covered in substance by other instructions. *Wal-Mart Stores v. Wright*, 774 N.E.2d 891 (Ind. 2002).

Here, the trial court did not err by instructing the jury on voluntary intoxication because the instruction was a correct statement of the law supported by evidence in the record. Indiana Code Ann. § 35-41-3-5 (West, PREMISE through 2007 1st Regular Sess.) explains that intoxication is only a defense if the intoxication results from the introduction of a substance into the defendant's body (1) without his consent; or (2) when he did not know that the substance might cause intoxication. Eichelberger testified that on the day he stabbed Beasley he wanted to get high so he huffed toluene. Eichelberger does not assert that the introduction of the toluene into his body was without his consent

or that he did not know the toluene would cause intoxication. Therefore, the trial court properly instructed the jury that in this case Eichelberger's voluntary intoxication was not a defense to the charge of murder.

Judgment affirmed.

MATHIAS, J., and ROBB, J., concur.